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In the Matter of)	
)	
Amendment of Part 2 of the Commission's)	
Rules to Allocate Spectrum Below 3 GHz)	
For Mobile and Fixed Services to Support the)	ET Docket No. 00-258
Introduction of New Advanced Wireless)	
Services, including Third Generation)	
Wireless Systems)	
)	
Mass Media Bureau Multipoint Distribution)	
Service and Instructional Television Fixed)	Report No. 164
Service Applications Accepted for Filing)	
)	
Mass Media Bureau Provides Further)	
Information Regarding Grants to ITFS and)	DA 01-751
MDS Two-Way Applications)	
)	

Sprint Corporation hereby respectfully submits its Opposition to the Emergency Petition to Defer Action on Applications filed by Verizon Wireless in the above-captioned proceeding.¹ In its Petition, Verizon Wireless urges the Commission to defer action on the applications currently pending before the Mass Media Bureau, in which

¹ See *Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Application Accepted for Filing, Public Notice, Report No. 164 (rel. Feb1, 2001); Mass Media Bureau Provides Further Information Regarding Grants of ITFS and MDS Two-Way Applications.*

Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) licensees request authority to establish two-way operations (“two-way Applications”). Verizon Wireless justifies its Emergency Petition on the grounds that the Mass Media Bureau, in a Public Notice released March 26, 2001, announced that it will begin granting the applications next week and that such action should be postponed until after the pending 3G proceeding. The Petition should be denied.

As a fundamental matter, Verizon Wireless’ Petition should be denied on procedural grounds. Verizon’s Wireless’ petition is for emergency relief, yet it fails to establish (and, indeed is incapable of establishing) the essential requirements which form the basis for such extraordinary relief—immediate irreparable harm to the petitioner or the public interest. Verizon Wireless has no MMDS or ITFS licenses or other vested interest in the proceeding and therefore lacks standing. It cannot claim that it will suffer immediate irreparable harm if the applications are granted. Furthermore, the public will not suffer immediate irreparable harm from a grant of the two-way applications—quite the contrary—the public interest would benefit from expeditious grant of the applications.

Any delay of the grant of the two-way licenses would be contrary to the public interest and would thwart the Commission’s stated goal of fostering the availability of widespread broadband service and increased competition. Every day that MMDS service is delayed, the public is denied access to a critical last-mile alternative. Delaying the grant of applications in an attempt to accommodate the speculative concern of Verizon Wireless, which holds not a single license in the band, to the detriment of entities such as Sprint, WorldCom and Nucentrix, which have dedicated substantial resources and time to bring new services to market as soon as possible, would defy precedent and common

sense. Sprint Echo's the Opposition filed by the Wireless Communications Association International in this proceeding and urges the Commission to deny Verizon Wireless' Emergency Petition.

Any delay in the grant of two-way applications is against the public interest and unfair to those such as Sprint who have spent vast amounts of effort and money developing MMDS/ITFS services

Postponing the grant of the two-way applications would be contrary to the public interest and would thwart the Commission's stated goal of fostering the availability of widespread broadband service and increased competition. The Commission has long recognized the public benefits to be gleaned from increased competition and that a cornerstone of FCC competition policy is the creation of a facilities-based competitive alternative for local broadband access to residences, small businesses and rural locations.² Fixed wireless broadband service offers just such a facilities-based alternative.

Subscription to Sprint's Broadband DirectSM Internet access service is growing at 2000 customers a week, clearly demonstrating the pent-up demand already in existence. As the Commission itself has recognized, it is likely that over the next several years, this demand for affordable broadband services will continue to skyrocket, far outpacing the ability of incumbent local exchange carriers and cable operators to provide those services.³ In fact, it has been estimated that existing telephone plant is "DSL capable" in

² Chairman William Kennard, "Consumer Choice Through Competition," NATOA (Sept. 17, 1999) (speech); see also, Commissioner Susan Ness, "A Pro-Consumer, Pro-Competition Agenda," Florida Communications Policy Symposium (Feb. 17, 1999); Commissioner Gloria Tristani, "Deploying Broadband More Broadly: Working Together to Roll-out Access in America's Small Cities and Rural Areas," New Mexico Communications Network Symposium (Nov. 10, 1999).

³ FCC Office of Engineering and Technology, Mass Media Bureau, Wireless Telecommunications Bureau and International Bureau, *Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems, Final Report* at 83, citing, e.g., *The "Wall Street Journal,"* "[t]he cable industries rush to wire up America with high-speed Internet access is running into a serious problem: Too

only 44% of the residential market and has been upgraded for cable in only 15% of smaller and more rural systems.⁴ The need for an immediate introduction of a new facilities-based provider is urgent. MMDS represents this critical facilities-based alternative to the existing providers and prompt deployment of MMDS services is in the public interest.

Sprint has invested vast amounts of money and effort to acquire, research, and launch MMDS operations for the provision of large-scale broadband systems targeted to residential and small business consumers. Any delay in the grant of the two-way applications will cause Sprint and the public harm in terms of lost business and lost service.⁵

The relief sought is unprecedented and runs contrary to Commission policy

The relief sought by Verizon Wireless is unprecedented and runs contrary to Commission policy. The cases on which Verizon Wireless ostensibly relies to establish a basis for granting the emergency petition and freezing the licenses are inapposite. Neither of those cases involved a freeze on applications for modification filed by existing

many heavy Internet users are crowding online at once, in some cases creating major bottlenecks and slowdowns.” And Cauley, “Heavy Traffic is Overloading Cable Companies’ New Internet Lines,” *The Wall Street Journal*, at B1, B16 (Mar. 16, 2000). (“*Final Report*”).

⁴ *Id.*, citing *Broadband! – A Joint Industry Study* by Sanford C. Bernstein & Co., Inc. and McKinsey & Company, Inc., at 25-26 (January 1999).

⁵ The Commission has previously recognized the potential harm delay could cause licensees in its denial of the emergency petition for postponement filed by ITFS 2020, stating: “Delaying the filing window for a lengthy period will hinder the availability of two-way service to the public and potentially put licensees at a competitive disadvantage with regard to other broadband services, *ITFS 2020 Emergency Petition for Postponement of Filing Window for Two-Way MDS and ITFS Applications*, MM No. 97-217, rel. June 23, 2000l, and has found that even a temporary delay in issuing licenses undermines the public interest (*Id.*, citing *Deferral of Licensing of MTA Commercial Broadband PCS*, 11 FCC Rcd 17052 (1996) (holding that even a temporary delay in the issuance of licenses would not be in the public interest when it would delay the introduction of new competition and services.)

licensees.⁶ Furthermore, as the Commission has stated: “[i]t is generally [the Commission’s] practice, during the pendency of a proposal to amend our licensing mechanisms, to continue using existing licensing procedures. “For example, during the pendency of our rule making in PR Docket No. 91-72, 6 FCC Rcd 2017 (1991) in which we broadly proposed to restructure licensing in the Special Emergency Radio Service, by creating the Emergency Medical Radio Service, we continued licensing pursuant to usual practices. Likewise, although our Notice in PR Docket No. 92-235, 7 FCC Rcd 8105 (1992), contains proposals that completely overhaul existing private radio licensing procedures, we are continuing to license according to our usual methods during the pendency of the proceeding.”⁷

Verizon Wireless’ attempt to delay the two-way window amounts to an unfounded, out-of time petition for reconsideration or unsupported petition for stay

Verizon Wireless’ petition for delay amounts to an out-of-time petition for reconsideration or unsupported petition for stay, which in either case must be rejected. Verizon Wireless had ample opportunity for comment on and objection to the application process. The Commission issued numerous Public Notices preceding its August 2000 filing window, followed by references to the applications in its November Interim Report⁸, a November Public Notice announcing the tendering of applications⁹, and a

⁶ *Creation of Low Power Radio Service*, 14 FCC Rcd 2471 (1999); *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 76 RR 2d 843 (1987).

⁷ See *BP Oil* at 7321.

⁸ FCC Office of Engineering and Technology, Mass Media Bureau, Wireless Telecommunications Bureau and International Bureau, *Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems, Interim Report* at 28.

⁹ Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Tendered for Filing,” *Public Notice*, Report No. 148 (rel. Nov. 29, 2000).

February Public Notice announcing the acceptance for filing of those applications.¹⁰

Raising issues now, which have been apparent throughout the rulemaking proceeding, is essentially seeking reconsideration far after the time to do so has run. Verizon should have brought any concerns it had to light during the extensive proceeding that finally led to the establishment of the application procedures, not days before the grant of applications.

The Emergency Petition must fail. An Emergency Petition must satisfy the requirements for all extraordinary relief—i.e., the 4-prong test for a stay and Verizon Wireless' petition fails on all four prongs.¹¹ To warrant a stay of an administrative action, the parties must make a convincing showing that: 1) they will suffer irreparable harm if a stay is not granted; 2) they are likely to prevail on the merits of a court appeal; 3) a stay would not harm other interested parties; and 4) a stay would serve the public interest. The most significant of these factors is irreparable harm.¹²

A. Petitioners have failed to show that they will suffer any irreparable harm absent a stay

"To justify a stay, the alleged harm must be great, imminent, and certain to occur unless the stay is granted; the harm must also be irreparable."¹³ "The injury must both be certain and great; it must be actual and not theoretical...the party seeking injunctive relief must show that 'the injury complained of [is] of such imminence that there is a 'clear and

¹⁰ Mass Media Bureau Multipoint Distribution Service and industrial Television Fixed Service Applications Accepted for Filing," *Public Notice*, Report No. 164 (rel. Feb. 1, 2001).

¹¹ See *Reynolds Metals Co. v. F.E.R.C.*, 250 U.S. App. D.C. 101,777 F2d 760 (D.C. Cir. 1985); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 16511 (1999) ("Competitive Bidding"); *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.* 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S. App. D.C. 10 , 259 F.2d 921 (D.C. Cir. 1958).

present' need for equitable relief to prevent irreparable harm.'" ¹⁴ The basis for the petition for delay –that the 3G proceeding may in the future influence the MMDS/ITFS band allocations—is theoretical and speculative and grant thereof would prejudice the Commission’s outstanding rulemaking proceeding.¹⁵ Therefore, the petitioners fail to meet this prong of the test for stay and the petition must be denied. ¹⁶

B. Petitioner has failed to show that it would likely prevail on the merits.

The petitioners would not prevail on the merits because they challenge the results of a well-considered, extensive proceeding well within the Commission's jurisdiction. The Commission's establishment of the application process is based on a full record that provided the public an extensive opportunity for comment. As discussed above, Verizon Wireless had ample opportunity to comment on the proceedings and raise any issues it might have had prior to the March Public Notice.¹⁷ The Commission took into account comments from the public in establishing its schedule and procedures. The petitioners would not prevail on the merits and their petitions also fail this prong of the test.

C. Granting of a stay would severely harm other interested parties

¹² *Competitive Bidding* at ¶ 9, citing *Wisconsin Gas Co. v. F.E.R.C.*, 756 F.2d 669, 673074 (D.C. Cir. 1985).

¹³ *Id.*, citing *Wisconsin Gas* at 673.

¹⁴ *Id.*

¹⁵ See *BP Oil Company, Application for Private Land Mobile and General Mobile Radio Services*, 8 FCC Rcd 7320, 7321 (rel. Oct. 13, 1993) (“BP Oil”), denying PacTel petition for Freeze, Application for Review, and Petition for Stay as “inappropriate because the grant thereof would prejudice our outstanding rule making.”

¹⁶ *Id.*, stating: “An award of the relief PacTel requests is inappropriate for the additional reason that PacTel has failed to demonstrate that absent the grant of its request for freeze, either it or the public interest will suffer irreparable harm. ...Furthermore, although it is within our discretion to impose a freeze on additional licensing, we generally have done so only where we have found that a failure to do so may inhibit our regulatory options.”

¹⁷ Certain ITFS Major Modification Applications and the Rolling One-Day Filing Window Procedure, Public Notice, DA 01-751 (rel. Mar. 26, 2001).

A grant of a stay would severely harm interested parties such as Sprint that have dedicated substantial resources and time to ensuring that the filing requirements and timeframe are met. Sprint's substantial success in its existing market reveals that there is strong public demand for MMDS service as a competitive alternative for broadband; however, if Commission approval of the two-way applications is delayed, Sprint's roll-out of these services will be stymied. Delay would therefore severely damage Sprint's ability to swiftly launch MMDS to compete other broadband offerings and would destroy the momentum Sprint has created. Verizon Wireless' petition also fails this prong of the test.

D. Granting of a stay would be contrary to the public interest

The Commission itself recognizes the importance of deploying broadband services as quickly as possible to meet the public's insatiable demand and has enthusiastically supported the expeditious launch of wireless systems as full-fledged competitors. A delay in the grant of the two-way applications would thwart this goal. The public is demanding service now and Sprint is prepared to provide it. Any delay in grant of applications would be contrary to the public interest of swift broadband deployment, and thus, this prong too is unmet and the petition must be denied.

Summary

The Verizon Wireless petition to delay the grant of the two-way licenses lacks legal and logical basis and runs contrary to the public interest and efforts by the Commission to foster the expeditious deployment of widespread broadband service and increased competition. Whether viewed as out-of-time petitions for reconsideration or unsupported petition for stay, the petition fails on all counts and must be denied.

Respectfully submitted,

Sprint Corporation

By: _____

Jay C. Keithley
Rikke K. Davis
401 9th Street, NW
Washington, DC 20004
(202) 585-1920
Its Attorneys

April 2, 2001

CERTIFICATE OF SERVICE

I, Joyce Walker, hereby certify that I have on this 2nd day of April 2001, served via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing " Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz For Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, Mass Media Bureau Multipoint Distribution Service and Instructional Television Fixed Service Applications Accepted for Filing, Report No. 164 and Mass Media Bureau Provides Further Information Regarding Grants to ITFS and MDS Two-Way Applications, DA 01-751, " filed this date with the Secretary, Federal Communications Commission, to the persons on the attached service list.

//s//

Joyce Walker

Michael Powell, Commissioner
Federal Communications Commission
45-12th Street SW., Room 8-A201
Washington, DC 20554

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
445-12th Street SW., Room 8-A302
Washington, DC 20554

Gloria Tristani, Commissioner
Federal Communications Commission
445-12th Street SW., Room 8-C302
Washington, DC 20554

Susan Ness, Commissioner
Federal Communications Commission
445-12th Street SW., Room 8-B115
Washington, DC 20554

ITS
The Portals
445 12th Street SW Room CY-B400
Washington, D.C. 20036

Marsha J. MacBride, Chief of Staff
Office of Chairman Powell
Federal Communications Commission
445-12th Street SW., Room 8B201E
Washington, DC 20554

William J. Friedman, Senior Legal Advisor
Federal Communications Commission
445-12th Street SW., Room 8C302
Washington, DC 20554

Adam D. Krinsky, Legal Advisor
Office of Commissioner Tristani
Federal Communications Commission
445-12th Street SW., Room 8C302
Washington, DC 20554

Mark D. Schneider, Sr. Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
445 12th Street SW., Room 8B115
Washington, DC. 20554

David Goodfriend, Legal Advisor
Office of Commissioner Ness
Federal Communications Commission
445 12th Street SW., Room 8B115

Peter Tenhula, Sr. Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street SW., Room 8A204
Washington, DC 20554

Bryan Tramont, Sr. Legal Advisor
Office to Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW., Room 8A302
Washington, DC 20554

Susan M. Eid, Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street SW., Room 8-A204
Washington, DC 20554

Helgi Walker, Legal Advisor
Office to Commissioner Furchtgott-Roth
Federal Communications Commission
445 12th Street SW., Room 8A302
Washington, DC 20554

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW., Room 3-C252
Washington, DC 20554

Tom Derenge, Chief
Spectrum Policy Branch
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW.
Washington, DC 20554

Diane J. Cornell, Associate Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW., Room 3C220
Washington, DC. 20554

Rodney Small
Spectrum Policy Branch
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW.
Washington, DC 20554

Charles Rush, Consultant
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW., Suite 3C303
Washington, DC 20554

Ira Keltz
Spectrum Policy Branch
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW.,
Washington, DC 20554

Bruce Franca, Acting Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW.,
Washington, DC 20554

Roy Stewart, Chief
Mass Media Bureau
Federal Communications Commission
445 12th Street SW., Room 2C337
Washington, DC 20554

Julius P. Knapp, Chief
Policy and Rules Division
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW., Room 7A123
Washington, DC 20554

Susan Fox, Deputy Chief
Mass Media Bureau
Federal Communications Commission
445 12th Street SW., Room 2C343
Washington, DC 20554

Geraldine Matise, Deputy Chief
Office of Engineering and Technology
Federal Communications Commission
445 12th Street SW., Room 7A123
Washington, DC 20554

Charles E. Dziedzic, Assistant Chief
Video Services Division
Federal Communications Commission
445 12th Street SW 2A864
Washington, DC 20554

Brad Lerner, Attorney Advisor
Mass Media Bureau
Federal Communications Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

David Roberts
Mass Media Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Sharon Bertelsen, Supervisory Attorney
MDS Section
Federal Communication Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

Barrett Brick
Mass Media Bureau
Federal Communication Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

Melvin Collings
Mass Media Bureau
Federal Communication Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

Richard Engelmann, Chief
Federal Communication Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

Nazifa Naim
Mass Media Bureau
Federal Communication Commission
445 12th Street SW., Room 2A733
Washington, DC 20554

John T. Scott
VP President and Deputy General Counsel
Verizon Wireless
1300 I Street NW
Suite 400 West
Washington, DC. 20005